



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Milwaukee Enrollment Services, Petitioner

vs.

DECISION ON REHEARING

██████████, Respondent

Case #: FOF - 172667

Pursuant to petition filed March 10, 2016, under 7 C.F.R. §273.16, to review a decision by Milwaukee Enrollment Services to disqualify ██████████ from receiving FoodShare benefits (FS) for a period of one year, a hearing was held on June 14, 2016, at Milwaukee, Wisconsin, with the judge appearing by telephone. The hearing was a rehearing. A hearing was held April 29, 2016, and on May 9, 2016 a decision sustaining the sanction was issued. The Division of Hearings and Appeals granted a hearing on May 25, 2016 after the respondent filed a request stating that she had not received a notice for the April 29 hearing.

The issue for determination is whether the respondent committed an Intentional Program Violation (IPV).

PARTIES IN INTEREST:

Petitioner:

Department of Health Services
1 West Wilson Street, Room 651
Madison, WI 53703

By: ██████████
Milwaukee Enrollment Services
1220 W. Vliet Street
Milwaukee, Wisconsin 53205

Respondent:

██████████
██████████
██████████

ADMINISTRATIVE LAW JUDGE:

Brian C. Schneider
Division of Hearings and Appeals

FINDINGS OF FACT

1. The respondent (CARES # [REDACTED]) is a resident of Milwaukee County who received FS benefits in 2012.
2. Due to her enrollment in the FS program, the respondent was issued a QUEST card which she utilized to access her monthly FS allotment provided to respondent. QUEST cards are electronic benefit transfer cards that replaced food stamp coupon booklets.
3. On October 1, 2013, the respondent's QUEST card was utilized in a transaction involving [REDACTED] Distribution, LLC ([REDACTED]).
4. [REDACTED] was a licensed vendor of the United States Department of Agriculture Food and Nutrition Service, which enabled it to redeem QUEST cards.
5. [REDACTED] was classified as a mobile vendor and operated out of private vehicles. Between August, 2010 and January, 2013, [REDACTED] redeemed approximately \$778,000 in QUEST benefits from food stamp benefit recipients who were not purchasing food, but instead receiving cash at less than face value for providing access to their QUEST benefits.
6. On or about February 15, 2013, [REDACTED], doing business as [REDACTED], pled guilty to a charge of unlawfully purchasing and redeeming FS benefits. [REDACTED] admitted that no food or groceries were ever provided by [REDACTED] or [REDACTED] in exchange for Quest benefits.
7. On March 24, 2016, the petitioner prepared an Administrative Disqualification Hearing Notice alleging that respondent intentionally transferred \$200 in FS benefits to [REDACTED] in exchange for a cash payment. The respondent has no prior IPV sanctions.
8. The respondent did not do the October 1, 2013 transaction.

DISCUSSION

An intentional program violation of the FoodShare program occurs when a recipient intentionally does the following:

1. makes a false or misleading statement, or misrepresents, conceals or withholds facts;
or
2. commits any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any Wisconsin statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of FoodShare benefits or QUEST cards.

FoodShare Wisconsin Handbook, §3.14.1; see also 7 C.F.R. §273.16(c) and Wis. Stat., §§946.92(2).

Wisconsin statutes prohibit the intentional exchange of FS benefits for cash. The law specifically provides that to traffic food stamp program benefits means to do any of the following:

Buy, sell, steal, or otherwise accomplish the exchange of, directly, indirectly, in collusion with others, or individually, food stamp program benefits issued and accessed through the electronic benefit transfer program under s. 49.797, or by manual voucher and signature, for cash or other consideration that is not food.

Wis. Stat., §946.92(1)(dm); see also 7 C.F.R. §271.5(b).

An intentional program violation can be proven by a court order, a diversion agreement entered into with the local district attorney, a waiver of a right to a hearing, or an administrative disqualification hearing. *FoodShare*

Wisconsin Handbook, §3.14.1. The petitioner can disqualify only the individual found to have committed the intentional violation; it cannot disqualify the entire household. Those disqualified on grounds involving the improper transfer of FS benefits are ineligible to participate in the FoodShare program for one year for the first violation, two years for the second violation, and permanently for the third violation. Although other family members cannot be disqualified, their monthly allotments will be reduced unless they agree to make restitution within 30 days of the date that the FS program mails a written demand letter. 7 C.F.R. §273.16(b).

In order for the petitioner to establish that an FS recipient has committed an IPV, it has the burden to prove two separate elements by clear and convincing evidence. The recipient must have: 1) committed; and 2) intended to commit a program violation per 7 C.F.R. § 273.16(e)(6). In *Kuehn v. Kuehn*, 11 Wis.2d 15 (1959), the court held that:

Defined in terms of quantity of proof, reasonable certitude or reasonable certainty in ordinary civil cases may be attained by or be based on a mere or fair preponderance of the evidence. Such certainty need not necessarily exclude the probability that the contrary conclusion may be true. In fraud cases it has been stated the preponderance of the evidence should be clear and satisfactory to indicate or sustain a greater degree of certitude. Such degree of certitude has also been defined as being produced by clear, satisfactory, and convincing evidence. Such evidence, however, need not eliminate a reasonable doubt that the alternative or opposite conclusion may be true....

Kuehn, 11 Wis.2d at 26.

Wisconsin Jury Instruction – Civil 205 is also instructive. It provides:

Clear, satisfactory and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that “yes” should be the answer because of its greater weight and clear convincing power. “Reasonable certainty” means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. This burden of proof is known as the “middle burden.” The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence but may be less than beyond a reasonable doubt.

Further, the *McCormick* treatise states that “it has been persuasively suggested that [the clear and convincing evidence standard of proof] could be more simply and intelligibly translated to the jury if they were instructed that they must be persuaded that the truth of the contention is highly probable.” 2 *McCormick on Evidence* §340 (John W. Strong gen. ed., 4th ed. 1992).

In order to find that an IPV was committed, the trier of fact must derive from the evidence a firm conviction as to the existence of each of the two elements even though there may be a reasonable doubt as to their existence.

In order to prove the second element, i.e., intention, there must be clear and convincing evidence that the FS recipient intended to commit the IPV. The question of intent is generally one to be determined by the trier of fact. *State v. Lossman*, 118 Wis.2d 526 (1984). There is a general rule that a person is presumed to know and intend the probable and natural consequences of his or her own voluntary words or acts. See *John F. Jelke Co. v. Beck*, 208 Wis. 650 (1932); 31A C.J.S. Evidence §131. Intention is a subjective state of mind to be determined upon all the facts. *Lecus v. American Mut. Ins. Co. of Boston*, 81 Wis.2d 183 (1977). Thus there must be clear and convincing evidence that the FS recipient knew that the act or omission was a violation of the FS Program but committed the violation anyway.

Based upon the record before me, I find that the respondent did not traffic FS with [REDACTED]. The respondent testified that she never did business with [REDACTED]. She had no idea how her card was utilized at [REDACTED] but she surmised that a family member might have used it there. While generally “I do not remember” is a poor response to evidence, in

this case I will accept the respondent's testimony that she was not the person who did business with [REDACTED]. That it happened just once makes it possible that someone petitioner allowed to use her card used it unlawfully, but I acknowledge that I am giving petitioner a tremendous break with this conclusion.

CONCLUSIONS OF LAW

The respondent did not violate the FS program rule specifying that an FS recipient shall not knowingly transfer food coupons except to purchase food.

NOW, THEREFORE, it is ORDERED

That the petitioner's determination of an intentional program violation is reversed, and the petition for review is hereby dismissed. The agency shall restore petitioner's FS eligibility retroactive to the date the sanction was imposed following the May 9, 2016 initial decision in this case, if one was imposed prior to the rehearing being granted.

APPEAL TO COURT

You may appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, WI 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing request (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison,
Wisconsin, this 20th day of June, 2016

\sBrian C. Schneider
Administrative Law Judge
Division of Hearings and Appeals

c: Miles - email
Public Assistance Collection Unit - email
Division of Health Care Access and Accountability - email
[REDACTED] - email



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

Brian Hayes, Administrator
Suite 201
5005 University Avenue
Madison, WI 53705-5400

Telephone: (608) 266-3096
FAX: (608) 264-9885
email: DHAMail@wisconsin.gov
Internet: <http://dha.state.wi.us>

The preceding decision was sent to the following parties on June 20, 2016.

Milwaukee Enrollment Services
Public Assistance Collection Unit
Division of Health Care Access and Accountability
[REDACTED]